

**BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION**

**In the Matter of the Nebraska Public Service Commission, on its own motion, to make adjustments to the universal service fund mechanism established in NUSF-26**

**Application No. NUSF-50**

**QWEST CORPORATION'S COMMENTS TO STAFF PORTING PROPOSAL REFERENCED IN DECEMBER 19, 2006 ORDER**

Qwest Corporation ("Qwest") submits its initial comments to the staff NUSF porting proposal outlined in its post-hearing brief in this matter and referenced in the Commission's December 19, 2006 Order in this Docket, as follows:

***Introduction***

In paragraph 30 of its December 19 Order, the Commission asked for "comment on the staff proposal to eliminate ported support in zones 1 and 2." These comments are sought based on an alternative proposal raised for the first time in Staff's post-hearing brief in this docket filed on November 29, 2006. In that brief, Staff recommended that "the Commission should adopt an interim measure until NUSF-50 PO 2 and C-3554 are resolved." Staff Brief, at 12-13. Later, Staff suggested two alternatives, presumably as interim measures until NUSF-50 PO 2 ("*Progression Order No. 2*") and C-3554 are resolved:

As an alternative for the Commission to consider, the staff recommends the Commission eliminate support in zones 1 and 2 pending the completion of NUSF-50, PO 2 and C-3554. However, if the Commission believes this alternative to be inappropriate, then it should consider a uniform reduction to all CLEC support.

Staff Brief, at 13.

At an open question and answer session hosted by Commission Staff, Staff clarified that the interim proposal would only affect ported support – that is, the Staff proposal is to eliminate porting of NUSF support in Zones 1 and 2, not to eliminate all NUSF support for those two zones. Second, Staff suggested that the proposal may be further clarified based on comments submitted by the parties on February 2, and may be presented to the Commission as a proposal for an interim resolution to *Progression Order No. 2* and Docket C-3554, or as an alternative resolution to the two dockets if the Staff's other proposals are not accepted. Qwest does not support the adoption of the Staff proposal on an interim basis, but with further examination, the proposal could be used as an alternative resolution if all other avenues to properly target portable NUSF support to supported facilities and services are deemed unsatisfactory.

### ***Substantive Comments***

The federal and state universal service fund statutes both require that support be computed and distributed on a "competitively neutral" basis. 47 USC § 253(b) requires that any state rules regarding universal service must be "competitively neutral." Similarly, The FCC has declared that "competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." *In the Matter of Federal-State Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8776, FCC Release No. 97-157, ¶ 47 (May 8, 1997).

"Competitively neutral" does not mean that NUSF funding and porting mechanisms should artificially promote competition, however. As the Commission observed in docket C-2932:

The Commission believes that universal service is not a vehicle by which competition should be artificially created. The purpose of universal service is not to promote competition. Rather, the purpose of universal service is found in section 254 of the Act. To this end, the Commission's role is to ensure that the universal service principles continue to be served in a competitive environment.<sup>1</sup>

Similarly, the FCC observed in *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776; 1997 FCC LEXIS 5786, FCC Release No. 97-157, ¶ 289 (May 8, 1997 Released; Adopted May 7, 1997), "because a competing eligible telecommunications carrier must provide service and advertise its service throughout the entire service area, consistent with section 214(e), the CLEC cannot profit by limiting service to low cost areas."

The limitation of the use of support – including portable support – to supported high-cost areas and facilities is clear in both federal and state law. In *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 622 (5<sup>th</sup> Cir. 2000), the 5th Circuit found competitive neutrality and the use of support for intended services and facilities to be integral components of portability: "...portability is not only consistent with predictability, but also is dictated by principles of competitive neutrality and the statutory command that universal service support be spent 'only for the provision, maintenance, and upgrading of facilities and services for which the [universal service] support is intended.'"

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<sup>1</sup> February 10, 2004 Order, Docket No. C-2932, p. 8-9. The US District Court for Nebraska recently vacated this order in *NPCR, Inc. v. Boyle*, 2006 US Dist. LEXIS 88113 (D. Neb. December 5, 2006), but never challenged or analyzed the Commission's quoted declaration of the purposes of universal service as they relate to the creation or promotion of competition.

47 USC § 254(e)." Thus, under the federal statutes, portability is similarly limited such that funds made portable should only be spent for supported facilities or services.

Nebraska law dictates similar limitations. Under Neb. Rev. Stat. § 86-323(5), "[f]unds for the support of high-cost areas will be available only to the designated eligible telecommunications companies providing service to such areas;" and § 324(1) limits support to ETCs "eligible to receive support to serve high-cost areas from the fund." The Commission's NUSF Rules, Title 291, Chapter 10, Rule 004.04 state that "NUSF funding shall be used by telecommunications companies solely for the provision, maintenance, and upgrading of facilities and services for which support is intended."

The Commission must balance these considerations as it evaluates the various proposals in this docket. Carriers should not receive support for services or facilities that serve in-town customers or businesses, because the Commission has repeatedly determined that support should be targeted to high-cost out-of-town residential customers and the facilities that serve them. In all three wholesale zones, CLECs obtain significant ported support for serving in-town customers – customers for which Qwest as the incumbent receives no support. CLECs serving in-town customers or businesses cannot use that support "solely for the provision, maintenance, and upgrading of facilities and services for which support is intended," and as such the current porting mechanisms fail under both Nebraska and federal law.

Also, under currently effective orders in dockets NUSF-26 and C-3448, CLEC porting does not decrease as the incumbent's support decreases. Qwest's support will decrease to \$4 million or less after all the transition mechanisms from dockets NUSF-50

and NUSF-26 expire. Meanwhile, porting to CLECs, which currently exceeds \$10 million, is not scheduled to decrease. At some point in the very near future, if porting methodologies do not change, Qwest will receive no net support after porting, despite carrying the obligation to build and maintain the underlying network.

This result is not competitively neutral, and has given rise to the consideration of several different proposals in this and related dockets. The staff proposal to eliminate porting in zones 1 and 2 appears to represent a rough approximation to reflect that CLECs should obtain less support than they currently receive, and thus represents a possible temporary remedy. However, removing porting in zones 1 and 2 appears to be only a rough attempt to limit porting to high-cost areas, rather than a permanent and carefully targeted solution. In addition, implementing the staff proposal would involve transaction costs from switching to an interim porting method and then switching again to a different permanent porting method.

The Commission's proposal in *Progression Order No. 2* (subject to the clarifications Qwest suggests) represents a fair methodology for making sure that CLECs receive the same amount of NUSF support Qwest receives, for the customers and areas Qwest receives support. The Porting Method ("PM") proposal outlined in *Progression Order No. 2* generally seems to remedy these problems by making sure that support is ported only for out-of-town residential areas for which the Commission has already decided should receive the limited funds available, and also appears to reduce the amount of support that would be ported as and if incumbent support is reduced. The proposed methodology will encourage CLECs to serve the out-of-town areas the NUSF is intended to support, and avoid creating perverse incentives for

serving customers in Zones 2 and 3.<sup>2</sup>

In addition, the PM proposal in *Progression Order No. 2* is adaptable to different UNE-loop rates. This means that the *Progression Order No. 2* proposal can therefore be quickly implemented as a permanent solution regardless of, and even perhaps without waiting for, the resolution of C-3554. Under the *Progression Order No. 2* model, assuming the proceedings in Docket No. C-3554 yield TELRIC-compliant rates consistent with the federal Act, those rates can simply be plugged into the model to accomplish distributions on a competitively neutral manner. Qwest therefore encourages the Commission to move quickly and adopt the *Progression Order No. 2* proposal, and decline further consideration of the staff proposal.

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<sup>2</sup> Under the current NUSF-26 porting system, CLECs pay \$62.49 for a loop in Qwest's Zone 3, but for residential customers receive \$69.59 in porting funds taken from Qwest's distribution. This means that Qwest pays CLECs more than seven dollars each month for each residential customer Qwest loses to competition in Zone 3. Even for business customers acquired before November 2004, CLECs pay less than six dollars (net) for each loop they acquire (TELRIC rate of \$62.49 less ported support of \$56.87, or \$5.62). Meanwhile, Qwest receives no support for more than 99% of these lines.

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Respectfully submitted,

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### **Certificate of Service**

I certify that on the 2nd day of February, 2007, a true and correct copy of the foregoing was sent via electronic mail and First-class U.S. mail, postage prepaid, to the following:

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